No. 13,016

IN THE

United States Court of Appeals

For the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage,

Appellants,

vs.

ARTHUR E. ASHLEY and VIRGINIA ASHLEY,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

RALPH E. MOODY,
City Attorney, City of Anchorage,
Pearl Building, Anchorage, Alaska,
Attorney for Appellants.

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JURISDICTION.

This is an appeal taken from an order filed and entered in the District Court for the Third Division, Territory of Alaska, on the 29th day of January, 1951. This order granted a motion for summary judgment in favor of the Plaintiffs and against the Defendants. (R. 125.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 2, Alaska Compiled Laws Annotated, 1949, entitled "Actions by and Against Public Corporations and Officers", Section 56-2-2.

A complaint was filed in the District Court on the 4th day of December, 1950. (R. 3.) On the 22nd day of December, 1950, defendants, through their attorney, filed a motion to dismiss the action. (R. 9.) On the 26th day of December, 1950, plaintiffs filed motion for summary judgment. (R. 10.) Hearings on this motion were held on the 5th and 15th days of January, 1951. (R. 10.) On the 4th day of January, 1951 defendants' motion in response to plaintiffs' action for summary judgment was filed. (R. 46.) An opinion granting plaintiffs' motion for summary judgment was filed and entered the 29th day of January, 1951. (R. 125.)

On the 17th day of April, 1951, appellant filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit (R. 138) and an order allowing said appeal was duly and regularly signed and entered on the 20th day of April, 1951. On the 26th day of May, 1951, an order extending the time in which to file the record and docket the appeal to the ninetieth day from the date of filing the notice of appeal was duly and regularly signed and entered. (R. 139.)

The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 (Chapter 83) of the Judiciary and Judicial Pro-

cedure Act, 28 U.S.C.A. (June 25, 1948, C 646, 62 Stat. 929). This appeal is governed by Section 8-c of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294) June 25, 1948, C 646, 62 Stat. 930.

STATUTORY PROVISIONS INVOLVED.

Session Laws of Alaska, 1923:

Section 63. *Property Specially Benefited May Be Assessed For Cost of Local Improvements. When.* The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erecting, strengthening or repairing, bulkheads, embankments or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements.

Section 64. *Council Must Determine Necessity of Improvements and Sufficiency of Petition.*

When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly.

Section 65. *When Assessment Authorized.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be (the) assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property.

Compiled Laws of Alaska, 1933:

Section 2431. *Local improvement districts; assessments.* The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erect-

ing, strengthening or repairing bulkheads, embankments or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements. (63-97-23).

Section 2432. *Council determines necessity of; sufficiency of petition praying for.* When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly. (64-97-23).

Section 2433. *Assessment; when authorized.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property

to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be assessed against the real property so benefited in proportion to the amount of such benefit received, by each tract of property. (65-97-23).

Alaska Compiled Laws Annotated, 1949:

Section 16-1-81. *Improvements for which assessment authorized: Property benefited: Amount of assessment: Owners' request for improvement.* The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erecting, strengthening or repairing, bulkheads, embankments, or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements. (L 1923, ch 97, Sec. 63, p. 221; CLA 1933, Sec. 2431.)

Section 16-1-82. *Council to determine necessity of improvements and sufficiency of petition:*

Findings: Forgery. When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly. (L 1923, ch 97, Sec. 64, p. 221; CLA 1933, Sec. 2432.)

Section 16-1-83. *Decision of council as to improvement and assessment.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be (the) assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property. (L 1923, ch 97, Sec. 65, p. 222; CLA 1933, Sec. 2433.)

Section 16-1-92. * * * *Special assessments.* The city shall have the power to provide by ordinance for doing any or all work thereupon or therein authorized by this Act, and for the payment of the costs and expenses thereof by the levy and collection of special assessments therefor upon the property to be benefited thereby. That

is to say, the expense or cost of any work or improvements upon the streets, sewers, avenues, or public ways of such city shall be assessed upon the lots and lands fronting thereon, and adjoining, contiguous, proximate and non-contiguous in the improvement district proximate or specially benefited thereby; each lot being separately assessed for the full debt thereof in proportion to the benefits upon the property to be benefited, sufficient to cover the total expense of the work. (L 1927, ch. 56, Sec. 2, p. 97; CLA 1933, Sec. 2462.)

STATEMENT OF THE CASE.

On April 20, 1949, the City Council of Anchorage, Alaska, enacted Ordinance 1005 (R. 75) confirming the result of a special election held pursuant to Ordinance 193 (R. 67), providing among other things the construction of two trunk outfall sewer lines. On the same day the Council enacted Ordinance 1007. (R. 78.) Section 5 of this ordinance (R. 79) obliged the city to levy special assessments and pledge these assessments to repay the General Obligation Bonds authorized. On July 1, 1949 the contract for the construction of the sewer was let. (R. 127.) Between April 1 and prior to July 1, 1949, petitions were circulated and signatures obtained of a majority in number of the property owners asking for the construction of the sewer and consenting to the levy of the special assessment. (R. 54.) Appellees did not sign the petition but it contained the majority of signatures required to satisfy Section 16-1-81, et seq.,

ACLA, 1949. (R. 126, 127.) On March 1, 1950, Resolution 545 (R. 81) was enacted in conformity with the requirements of Section 16-1-82 (R. 127) finding the petition sufficient and the improvement necessary. On March 2, 1950, Resolution 570 (R. 85) was enacted assessing to each of the lots contained in the improved districts specially benefited in proportion to the benefit received by each lot by two-thirds of the cost of the improvement (R. 86). This resolution also set a date for hearings on objections to the assessments (R. 87) as well as notice by the city clerk as to the amount of the assessment to each owner of the properties benefited (R. 87). Appellees owned property so benefited by these improvements. They appeared at the hearing of the council held in accordance with Resolution 570, on September 29, 1950. The extent of their objection to the special assessment was to request "that the council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund". (R. 38.)

On October 18, 1950, Resolution 577 was enacted (R. 88) levying the assessments as passed and fixing the time of delinquency payment and penalties.

On October 24, 1950 notice was mailed to appellees stating the amount of the assessments as finally settled and manner of payments. (R. 7.)

On December 4, 1950 a complaint was filed by appellees seeking to enjoin appellants from asserting in any manner any claim or lien adverse to the appellees by virtue of the assessment on appellees' property

on the grounds that the assessment and lien on appellees' land was contrary to the statutes of the Territory of Alaska. (R. 5.)

On December 22, 1950 appellants filed a motion to dismiss (R. 9) which was denied on December 29, 1950. On the same day appellees moved for summary judgment. (R. 10.) On January 5, 1951 appellants filed motion in response to appellees' motion for summary judgment contending the existence of factual issues. (R. 26.) Hearings were held on these motions on January 5 and 15, 1951.

On January 29, 1951 the District Court handed down a formal opinion (R. 125) granting appellees' motion for summary judgment on the ground that the statutes of the territory were not followed as held in *In re Ketchikan Delinquent Tax Roll,* 293 F. 577. (R. 130.)

SPECIFICATION OF ERRORS.

1. The Court erred in holding the provisions of 16-1-81, 16-1-82, 16-1-83 of Alaska Compiled Laws Annotated 1949, also in Sections 2431, 2432 and 2433, Compiled Laws of Alaska 1933, also in Chapter 97, Sections 63, 64 and 65 of Session Laws of Alaska, 1923, to be mandatory.

2. The Court erred in holding the order of compliance with the above sections to be mandatory.

3. The Court erred in holding that the provisions and order of the above sections were not complied with.

4. The Court erred in granting summary judgment when there remained issues of fact, which issues clearly arose out of the pleadings and were at no time waived by appellants. These issues included the issue of fact as to estoppel of appellees and waiver of objections by appellees due to failure to specifically object to the assessments at public hearings provided therefor.

5. The Court erred in denying appellants' motion to dismiss.

ARGUMENT.

SPECIFICATION OF ERROR 1.

Specification 1. The Court erred in holding the provisions of 16-1-81, 16-1-82, 16-1-83 of Alaska Compiled Laws Annotated 1949, also in Sections 2431, 2432, 2433, Compiled Laws of Alaska 1933, also in Chapter 97, Sections 63, 64 and 65 of Session Laws of Alaska 1923, to be mandatory.

SPECIFICATION OF ERROR 2.

Specification 2. The Court erred in holding the order of compliance with the above sections to be mandatory.

SPECIFICATION OF ERROR 3.

Specification 3. The Court erred in holding that the provisions and order of the above sections were not complied with.

The argument on these three specifications of error is presented together inasmuch as they involve the

same point, i.e., the provisions of Sections 16-1-81, et seq., of Alaska Compiled Laws, 1949, to be mandatory.

With respect to the text of the provisions in question (R. 126, 127) enacted by the Territorial Legislature in 1923, Session Laws of Alaska, Chapter 97 (R. 128, 129), it will be seen every enumeration or description of the new Act embraced in these sections concerns the method of assessment for local improvements. The argument as to the interpretation of the statute in its presently enacted form rests therefore alone upon the proposition that because the word "must" appears in the title of Section 64, Chapter 97 (R. 129) the detailed requirements are mandatory and the steps outlined must be taken in order.

But to adopt this construction, it is submitted, would cause the statute to create a limitation upon the authorities vested with its application, which the legislature had no intention of doing. When the original text, and which is new law, is taken into view, the conclusion inevitably follows that the purpose of the law was but to more specifically define the methods the council were to use in assessing real property owners for improvements benefiting their property. In other words, the only purpose of the law was to more fully deal with the subjects with which the provision as enacted dealt, and not by way of the legislature attempting to legislate every conceivable step to be taken by the council in the order in which it appears in the text.

In *United States v. Farenholt,* 206 U.S. 226 (1906), the Court said, page 229:

> A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in spirit, though not within the letter of the text.

In the construction of statutes certain rules have obtained, so that a Court may not be misled if these rules are followed. Human language being incapable of always accurately expressing the intentions of the legislature, recourse is had to the customs existing at the time of enactment of the law, in order that the actual intention of the legislature may be ascertained. This is not simply interpretation. Interpretation differs from construction in that it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions that are not always included in the direct expression. But as a rule construction and interpretation of a statute arise after enactment. To illustrate, the administrtaion of justice is conferred upon the Courts and the Courts perform that duty by ascertaining the facts in any given case and giving their conclusions by applying the laws to the facts at issue. In doing so, an interpretation of law is necessary. Where inferior Courts construe laws, their de-

cisions may be reversed by a higher Court or by the United States Supreme Court.

The intent of the legislature is the law, no matter what form of words are used to express that intent. Primarily, this intent is to be found in the words of the law itself, and the presumption attaches that the language used will furnish conclusive expression of that intent. Interpretation by the Courts often demonstrates the fact that men use words in such a manner as would establish a rule directly contrary with the intent of the lawmaking power.

In 25 *R.C.L.* 959, Section 215, under heading, "Meaning to be Given as of Time of Enactment," it is said:

> There is always a tendency, it has been said, to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the result of experience. The true rule is that statutes are to be construed as they were intended to be understood when they are passed. *United States v. Union Pacific Railroad Co.,* 91 U.S. 72; *Schuyler County v. Thomas,* 98 U.S. 169.

If the language of the statute considered as a whole and with due regard to its nature and object reveals that the legislature intended the word "shall" to be directory, it should be given that meaning. *United States v. Boyd,* 24 F. 692, 694 (C.C. S.D. N.Y., 1885), reversed on other ground, 116 U.S. 616; *United States v. Sixty Six Cases of Cheese* (C.C. E.D. N.Y., 1908), 163 F. 367.

Similarly the use of the word "must" does not make the provision mandatory. In *Skelly Estate Co. v. City and County etc.* (Sup. Ct. Calif. 1937), 69 P. (2d) 171, the Court, construing the validity of a tax levy employing "must", said, page 174:

> The general use of the word "must" in an act does not *ipso facto* make the provision mandatory. Nor is the construction to be placed on a tax statute in which that word is used to be stricter, necessarily, than another statute not having taxation procedure for its subject matter. In *Rutledge v. City of Eureka,* 195 Cal. 404, 234 P. 82, 90, this Court aptly said: "There is no declaration in the section that its language is mandatory. The use of the word 'must' is not necessarily determinative of its mandatory import. The words 'shall' and 'must' are frequently construed as directory terms." *Cake v. City of Los Angeles,* 164 Cal. 705, 130 P. 723; *People ex rel. Thompson v. San Bernardino High School Dist.,* 62 Cal. App. 67, 216 P. 959.

It is true that the title of the Act of 1923, Chapter 97 of the Session Laws of Alaska, Section 64, contained the following:

> Council must determine the necessity of improvement * * *

but it has been long held that the title is no part of the statute, and cannot be used to nullify the obvious meaning found in the text.

In *Hadden v. The Collector,* 5 Wall. 107, 72 U.S. 107 (1866), we find at page 110:

> The title of an act furnishes little aid in the construction of its provisions * * * At the present day the title constitutes a part of the act, but is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. *It is seldom the subject of special consideration by the legislature.* (Emphasis added.)

And in *United States v. Oregon and California Railroad Company,* 164 U.S. 526, 541 (1896), the Court said:

> The title is no part of the act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.

The Court in *Patterson v. Bark Eudora,* 190 U.S. 169, 173 (1902), quoting Chief Justice Marshall on the extent to which a title can be used, laid down the rule:

> Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such a case, the title claims a degree of notice, and will have its due share of consideration.

See also: *Mud River Co. v. Town of Walcott,* 81 A.(2d) 119, 122, 137 Conn. 680 (Sup.Ct. Conn.); *United States v. Jourden,* Alaska, 4 A. 354, 356 (D.C. 2nd Div. 1911).

We think the text of the ordinances does not support the construction or interpretation placed thereon by the District Court. But if the interpretation can be said to be a matter of doubt we can look to the construction given these ordinances by the authorities of the City of Anchorage. It appears that in the administration of these ordinances from the time of the enactment to the institution of this action they were construed by the authorities of the city council as applying to special assessments against property specially benefited by such improvements. Not only were they so construed, but the city council of Anchorage, when it adopted Ordinance #193 (R. 67) on March 5, 1947 and later adopted Ordinance #1005 (R. 76) on April 20, 1949 and Ordinance #1007 (R. 78) on April 20, 1949 they stated:

> Section 5. The city hereby agrees that as soon as practicable after a legal petition for the construction and installation of the necessary additions, improvements and extensions to the present sewage system of the city has been filed and such work authorized, it will levy assessments against the property specially benefited by such improvements in a total amount not to exceed two-thirds of the cost thereof, payable in not more than five annual installments, and thereafter collect such installments and deposit the same in the Bond Redemption Fund hereinafter created, for the sole purpose of paying the principal of and interest on the bonds authorized herein.
>
> If said petition is not received and the Common Council of the city creates a sewer improvement

> district and levies and assesses part or all of the cost of such improvements against the property within such district specially benefited by such improvements, such assessments shall be made payable in not more than five annual installments and, when collected, shall be deposited in said Bond Redemption Fund and shall be used solely for the purpose of paying the principal of and interest on the bonds authorized herein.
> * * * * * * *

So that if there could be said to be ambiguity in the law under which these ordinances were adopted, the construction placed upon them by the officers charged with their execution should be favored by the courts. *Luckenbach Steamship Co. v. United States,* 280 U.S. 173; *United States v. Alabama Great Southern Ry. Co.,* 142 U.S. 615; *United States v. Missouri Pacific Ry. Co.,* 278 U.S. 269; *United States v. Jackson,* 280 U.S. 183; *Taylor v. Tayrien* (C.A. 10), 51 F.2d 884.

In *City of Belton v. Brown Crummer Investment Co.,* 17 F.2d 70, 71, the Court said:

> It can make no difference whether the ordinance authorizing the paving warrants was adopted at a regular or special meeting of this council, in view of the proof that all members of the council were present and participated in its adoption.

In *Schonfeld v. City of Seattle,* 265 F. 726, 730 (D.C. W.D. Wash. 1920), although the question decided by the Court was whether the constitutional rights of the plaintiff were violated by the city or-

dinance, the statement of the Court, in a practical sense, is applicable to the case before this Court. It was held:

> The contention that the ordinance is invalid because, in its presentation and adoption, the rules of procedure with relation to the passage of the ordinances were not followed, we think is disposed of by the statement that the *rules of procedure are directory,* and the council has the power to suspend the rules for reasons deemed sufficient to the members of the council acting as a legislative body. (Emphasis added.)

In *Luckenbach Steamship Company v. United States,* supra, the Court said at page 182:

> It is a settled doctrine of this Court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.

In *Great Northern Ry Co. v. City of Leavenworth,* 142 Pac. 1155, (Sup.Ct. Wash.) 1914, the city had initiated improvements prior to passing an ordinance covering such improvements. The law required that the council pass a resolution before work was to be done. Following completion and before any assessment was levied or attempted to be collected, a general ordinance had been passed covering that detail

and others which were attacked. The court said, page 1157:

> * * * Prior to the passage of this general ordinance, as already stated, each step in the proceding was directed by the city council, either by resolution or ordinance. There is no claim of fraud, collusion, or lack of sufficient notice. To now hold the assessment void because intiated prior to the passage of the general ordinance would be to give to the act an unwarranted construction.

Argument was made also in this case that the report of the engineer required by statute was jurisdictional, and because of defects therein "the assessment is void." To this the Court said, page 1157:

> The property owners who appeared and objected to the improvement being undertaken did not point out any defect in or urge objection on account of the report of the engineer. The question was raised for the first time in the form of an objection to the confirmation of the assessment roll. The defect in the engineer's report not being jurisdictional matter, it was waived by the appellants who appeared before the council in response to the notice and failed to offer any objection touching the report.
>
> * * * * * * *
>
> The rule appears to be that, where a property owner makes objections to the assessment procedings upon certain specified grounds, he thereby waives other objections which are not jurisdictional in the sense that they cannot be waived. The rule as stated in Page & Jones on Taxation by Assessment, Vol. 2, 1029 is:

> If the property owner makes objection to the assessment proceedings upon certain specified grounds, such action is not merely an omission on his part to object on other grounds which he does not specify, but it also tends to mislead public authorities to believe that the grounds of objection thus urged are the only grounds upon which he intends to rely. Accordingly, the conduct of the property owner in filing certain specified objections is held to prevent him from subsequently relying upon other and different objections to defeat the assessment.

The City Council is a continuous body.

The District Court following *In re Ketchikan Delinquent Tax Roll,* 293 F. 577 held because of a special election on October 4, 1949, for the election of two members of the City Council (R. 128) the Council which passed the resolution of March 2, 1950 (R. 81) was not the identical council which authorized the work even though, through election, the membership may have been the same. The Court said:

> The force of the opinion above quoted is not materially weakened by the fact that the assessment there made was under a statute which has since been repealed. This court is nevertheless bound by ruling that the steps must be followed in the order provided by statute without substantial deviation, and that one council is not permitted by ratification to validate in such a matter the acts of a previous council. (R. 133.)

We believe that the case before this Court is easily distinguished from the *Ketchikan* case upon

which the District Court relied. The District Court held, (R. 130) 95 F. Supp. 189:

> * * * this Court in this action is controlled by the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit, given in the year 1923, in the case of *In re Ketchikan Delinquent Tax Roll,* 293 F. 577, from which the following is quoted:
>
> > Section 627 of the Compiled Laws of the Territory of Alaska of 1913 provides as follows: That the said common council shall have and exercise the following powers: * * * Fourth: To provide for the location, construction, and maintenance of the necessary streets * * * If such street * * * is located and constructed *upon the petition of the owners of two-thirds in value of the property* * * *. (Emphasis added.)

The opinion of the District Court in *In re Ketchikan Delinquent Tax Roll,* supra, is reported in 6 Alaska 653. The District Court, after reviewing the facts, which disclosed three separate petitions filed for street extensions, said at page 657:

> It is shown clearly that two-thirds of the property owners on the proposed * * * street extension had not petitioned therefor.

If the petitions did not meet the requirements set forth in the act, it is clear that any action taken by the common council was void.

In *Ogden City v. Shepard,* 168 U.S. 224, the Court considered an alleged invalid assessment levied to collect the cost of paving one of the public streets in

the city. There was a direct attack made upon the validity of the assessment, founded upon an alleged lack of jurisdiction on the part of the common council. The court said, page 237:

> As we have seen, there was an entire want of jurisdiction in the common council to proceed *for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void.* (Emphasis added.)

No such condition or circumstance is present in the case before this Court. "Petitions were circulated and signatures obtained of a majority in number of the property owners" (R. 127) and "were before the council on July, 1949, when the work was authorized." (R. 128.) We submit that the facts of the two cases, though subject to the same law, are sufficiently different. Hence, *In re Ketchikan Delinquent Tax Roll,* supra, is not in point.

Under the usual municipal organization the members of the city council are elected annually or biennially and thus part of the membership is renewed at such times. The Code of Ordinances, General Code, City of Anchorage, Alaska, Section 201.2 enacted April 12, 1950, (16-1-31 A.C.L.A., 1949) provides for a staggered election of members of the city council. In other words, the entire body is not retired at one time and a new body elected. As such it has been held to be a continuous council regardless of any change in its members. In *Denio v. City of Huntington Beach* (Sup. Ct. Calif., 1943), 22 Cal. (2d) 580, 140 P. (2d) 392, the Court held at page 397 of 140 P. (2d):

> The council of a municipal corporation is a continuing body and in legal contemplation remains the same council regardless of changes in its personnel (citing cases).

The city council is a body unlike the Congress of the United States and the legislature of the state. As each Congress expires at the end of its period, the new Congress organizes itself over. The terms of the Representatives expire at the end of this period. The same is true of the Alaska Territorial Legislature. The city council, however, is a continuous body. In 37 Am. Jur. Municipal Corporations, p. 666 Sec. 50, it is stated:

> A municipal council is not, like the legislature of a state, a body which exists only during the term of which its members are elected, and which is created anew at each election, but is a continuous body although its membership may be changed every year, or at some other period. As a result of this principle, business begun in a municipal council may be completed after its members have gone out of office and a new council has been elected.

In 43 C.J. Municipal Corporations, p. 491, Sec. 473, we find this statement:

> * * * A municipal corporation is never without its governing body; and this body when duly organized is a continuous body, although there may be changes in its membership by reason of the expiration of the terms of its members, or because of vacancies occasioned by death, removal or other causes.

It has been held that the expiration of the terms of all members at the same time does not prevent the council from being a continuous body. A new council may take up proceedings which were left by the old council. *State (Booth) v. City of Bayonne* (Sup. Ct. N.J.), 56 N.J.L. 268, 28 A. 381, 382. In this case the Court was dealing with the question whether it would be within the power of the board of aldermen, *notwithstanding that an election had intervened,* to do certain administrative acts in carrying into effect street improvements authorized by the city charter and by an ordinance duly enacted. The Court holding in the affirmative said:

> There can be no serious contention that every time there is an annual charter election in the city of Bayonne, wherein one-half of the council go out of office and their successors are elected, that all prior proceedings end, and must be again commenced. The city council is a continuous body, and, as to street improvements, the new city council can take up the proceedings where they were left by the old council, and proceed to carry out the provisions of the charter in reference thereto.

SPECIFICATION OF ERROR 4.

Specification 4. The Court erred in granting summary judgment when there remained issues of fact, which issues clearly arose out of the pleadings and were at no time waived by appellants. These included the issue of fact as to estoppel of appellees

and waiver of objections by appellees due to failure to specifically object to the assessments at public hearings provided therefor.

SPECIFICATION OF ERROR 5.

Specification 5. The Court erred in denying appellants' motion to dismiss.

The argument on these two specifications is presented together.

The trial Court erred in holding that estoppel did not operate against the plaintiffs.

The levying of special assessments as a means of paying, in part, for improvements of a public nature have long been in general use. The power to levy such assessments, their validity and apportionment upon the particular property improved must stem from statutory enactments, local acts and ordinances. *In re Ketchikan Delinquent Tax Roll,* 293 F. 577 (C.C.A., 1923.)

The ordinary elements of estoppel must not be present before an attempt to contest a special assessment can arise. Estoppel presupposes an error on one side and fault upon the other and some defect, which, if taken advantage of by the party against whom it is asserted, would be inequitable. *Leather Manufacturers Bank v. Morgan,* 117 U.S. 96, 108 (1885). The application of the doctrine of equitable estoppel is applied by the Courts in accordance with the above established principles regardless of the field of law involved.

In *Rothschild v. Title Guarantee and Trust Co.,* 204 N.Y. 458, 97 N.E. 879 (C.A.N.Y.) 1912, the Court said:

> It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation. The courts apply it, in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them * * * It does not require the positive, distinct action or language needed and intended to renew and ratify a transaction and make it valid and binding; it prohibits a person, upon principles of honesty and fair and open dealing from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice.

In *Schmidt v. Village of Deer Park,* 78 N.E. (2d) 72 (C.A. Ohio) 1947, the Court in discussing the elements of equitable estoppel under circumstances which parallel the case at bar held, page 74:

> Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of this assessment; but to create an estoppel from silence merely, it must be shown that the owner had knowledge:
>
> 1. That the improvement was being made;
> 2. That it was intended to assess the cost thereof, or some part of it, upon his property;
> 3. That the infirmity or defect in the proceeding existed which he is to be estopped from asserting; and

4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation.

Substantially the same rules are set forth in *In re Ketchikan Delinquent Tax Roll,* 6 Alaska 653, affirmed 293 F. 577 (C.C.A., 1922).

On page 193 of 95 F. Supp. the trial Court erred in holding that:

> There is no proof that at the time the work was done the plaintiffs had knowledge that it was intended to assess the cost of the improvements or some part of it upon their property, and therefore I find that estoppel does not operate against the plaintiffs in this case.

That the appellees *were on notice* of the special assessment to be levied is outlined on pages 67 to 71 of the transcript.

Pursuant to and as authorized by the Act of Congress of the United States, approved June 18, 1946 (H. R. J. 112), a special election was called to be held in the City of Anchorage, Alaska, on the 27th day of March, 1947. (R. 68.) Such special election was to determine whether the city shall construct a trunk outfall sewer line to serve a certain section of the city and in payment of construction costs to issue General Obligation bonds in the sum of $225,000.00. (Proposition 4; R. 69.)

In Proposition 5 (R. 69), it was to be determined whether the City of Anchorage should issue General Obligation bonds, in the amount of $225,000.00, for the purpose of expanding the present sewage system located in said city.

Appellees owned property located in the areas covered by these propositions. (R. 10, 11, 12, 13, 14.)

Ordinance No. 193 (R. 67) outlining in full Propositions 4 and 5, Section 6, states:

> Notice of said election shall be given by posting written notice thereof at the United States Post Office in said city, on the bulletin board in the City Hall in said city, and at the corner of 4th Avenue and "E" Street in said city, all of which places are hereby found and declared to be conspicuous places within the corporate limits of said city. Said notice of election shall be posted at said designated places not less than twenty days prior to said election. (R. 71.)

Section 11 reads:

> This Ordinance shall be published in the Anchorage Times, a newspaper published at Anchorage, Alaska, for two consecutive weeks. (R. 75.)

Section 12 reads:

> This Ordinance shall take effect immediately upon its passage and approval, an emergency having been duly declared. (R. 75.)

Proposition 5 included also the manner in which the General Obligation bonds, including the interest

thereon, were to be handled. The proposition concludes with:

> * * * and pledge the proceeds of *any special assessments* which the City may by law assess and collect for such local special improvements for the payment of the principal and interest of said bonds, all as authorized by the Act of Congress of the United States, H. R. J. 112, approved June 18, 1946? (R. 69, 70.) (Emphasis added.)

The election was held and approved by the voters. (R. 15.)

We submit, therefore, that the District Court erred in holding that there were no issues of fact remaining to be determined. For example:

1. Publication and posting of Notice of Election pertaining to sewage improvements constituted knowledge on part of Appellees.
2. Objection by Appellees of assessment before the City Council raised factual issues whether or not notice had been given.
3. Construction of sewage project and facilities abutting Appellees' property constituted knowledge.

Regarding the appellees, it is scarcely possible to believe that they were not aware of the steps taken by the City Council of Anchorage to effect the improvements, and thereafter issue its bonds, even though it should be admitted that the published notice of election was not legally sufficient. They were owners of land within the proposed district. The proceedings

were all of a public nature, and the public election was held before the bonds were issued. Of these facts, we say it is impossible to believe that the appellees did not have knowledge at the time of their occurrence. On the contrary, they entirely acquiesced in all the proceedings leading up to their vague objection raised before the council at the hearing provided. We submit, it was then too late to call in question the fact determined by the city council, and *a fortiori,* it is too late to raise the question in the case before this Court, where it is shown that the council of the City of Anchorage did everything possible to meet the letter of the law in the statutes referred to. Appellees appeared at the hearing following notice of the assessment and objected only "that the council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund". (R. 38.) In doing so appellees failed to avail of their opportunity afforded by statute and make the objections to the assessments now urged upon the Court. Thus, all consideration of the present objection should be foreclosed. *Farncomb v. Denver,* 252 U.S. 7; *Milheim v. Moffat Tunnel Dist.,* 262 U.S. 710; *Gorham Mfg. Co. v. Tax Commissioner,* 266 U.S. 265; *First National Bank v. Weld County,* 264 U.S. 450.

In *Schmidt v. Village of Deer Park,* 78 N.E. (2d) 72 (1947), a case involving notice of assessment, the Court of Appeals, Ohio, said, page 73:

> We do not think it is necessary to discuss the soundness of the plaintiffs' contention or the

basis of the trial court's decision, as we have reached the conclusion that the plaintiffs were in no position to assert defects in the legislation authorizing these improvements and assessments. It is our view that the plaintiffs by their inaction with full knowledge of the facts have waived whatever right they had to object.

In *Turner v. Sievers,* 126 N.E. 504, Appellate Court of Indiana (1920), the Court defined "color of law" utilizing estoppel as against the owner questioning the validity of an assessment. The Court said, page 507:

> He bases this contention in part on a claim that Appellee, with knowledge that the alleged street was being improved by the city, and that an attempt would be made to assess the cost thereof against the abutting real estate, stood by during the progress of the work without making any objections thereto, and by reason of that fact is estopped to deny that the city did not have title to the alleged street. It may be conceded that an owner of property may be estopped, by his conduct, from questioning the validity of an assessment against the same although it is void because there was no actual legal authority upon which it could rest, if there is color of law to sustain the proceeding upon which such assessment is based.

"Color of Law" has been defined in Ballantine Dictionary (1930 Ed.) as the mere semblance of a legal right. *State of Iowa v. Des Moines,* 96 Iowa 521, 31 L.R.A. 186, 192, 65 N.W. 818.

A special assessment tax is an enforced contribution, a charge, an imposition by the city for city purposes or public needs. It is not founded upon either contract or agreement. As is said in 51 *Am. Jur.* Taxation, Section 5, pp. 38, 39:

> A tax is a forced charge, imposition, or contribution; it operates in invitum, and is in no way dependent upon the will or contractual assent, express or implied of the person taxed.

See also:

Welch v. Henry, 305 U.S. 134, 146;
Danville Traction & Power Co. v. City of Danville, 168 Va. 430, 436, 191 S.E. 592, 594.

This case has been terminated by a summary judgment (F.R.C.P. Rule 56), and whether in so doing the trial Court erred is in issue.

Summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue of fact remains for trial. The purpose of the rule is not to cut litigants off from their right of trial if they have issues of fact to try. The United States Supreme Court speaking through Mr. Justice Jackson, in *Sartor v. Arkansas Gas Corp.,* 321 U.S. 620, 623 (1943) said:

> The summary judgment rule provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

Rule 56, *Federal Rules of Civil Procedure,* Section (c) provides:

> * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law * * *

The summary judgment procedure is not a substitute for the trial of disputed issues of fact. *Blood v. Fleming* (C.A. 10, 1947), 161 F. (2d) 292, 295. The Appellate Court in this case considered the question, paralleling the question in the case at bar, whether the trial Court erred in entering a summary judgment. At page 295 the Court said:

> The rule was intended to provide against the vexation and delay which come from the formal setting for trial of those cases in which there is no substantial dispute on issues of fact. It was not intended to and should not be used as a substitute for a regular trial of cases in which there are disputed issues of fact upon which the outcome of the litigation depends.

It is also the duty of the Court to exercise extreme care in deciding whether a real issue of fact exists. *DeSavitsch v. Patterson,* 81 U.S. App. D.C. 358, 159 F. (2d) 15 (C.A.D.C. 1946). *Michel v. Meier,* 8 F.R.D. 428 (D.C.W.D. Mo., 1950).

In *Clark v. Taylor* (C.A. 2, 1947), 163 F. (2d) 940, the Court paid the following tribute to summary judgment process. On page 948 the Court said:

> Of course, expedition should not be the sole aim of procedure. It should never be purchased at the expense of preventing a fair trial. *For that reason, this court and others have discountenanced the use of a summary judgment, based on a mere written record, when it deprives one of the parties of a trial affording him the opportunity to cross examine important witnesses whose credibility may critically affect decision on issues of fact.* (Cases cited.) (Emphasis added.)

Summary judgment is not proper where the facts are uncertain and, as in the case at bar, require additional evidence to make them clear. In *Chemical Foundation, Inc. v. Universal-Cyclops Steel Corporation* (D.C.W.D. Pa. 1942), 2 F.R.D. 283, the Court said, page 284:

> Rule 56 was intended to grant relief by way of summary judgment where the facts appear certain from the pleadings, depositions, admissions and affidavits. It was not the intention that a summary judgment should be entered where the facts are uncertain and require evidence to make the same clear. It was not the intention of rule 56 that a case should be tried by affidavits as a substitute for trial in the usual way in open court, where the right of cross examination exists.

And on page 285, the Court continues:

> The pleadings, depositions, admissions and affidavits leave uncertain what the facts are as to the above contested claims of the plaintiff and of the defendant. The pleadings and affidavits raise

issues of fact. They are genuine issues as to the material facts relating to said claims. I am, therefore, of the opinion that the motion for summary judgment should be refused and that the facts should be developed by evidence taken before a special master, or by the court.

CONCLUSION.

It is submitted (1) that the record clearly shows that the appellees had notice of the proposed improvement; that they were aware of the special assessment to be levied to cover the costs of the special improvement; that they stood by and allowed the improvement to be made, benefiting their property, and therefore they are precluded from raising the issues presented in this case; (2) that the Court erred in holding that the sequence in which the council acted was not in accordance with the statutes; (3) that the Court erred in holding that the council was not a continuous body and that its action was void; (4) that the Court erred in holding that there were no factual issues remaining to be determined.

The purpose of municipal corporations is first to serve the local inhabitants by regulating and promoting community affairs. And second, to serve the people residing in the locality in common matters as an agency of the State or Territory. As such the welfare and health of the inhabitants is uppermost in the minds of the municipal authorities. And such police power exercised by ordinances of the council

has been looked upon with favor by the Courts where every attempt has been made by the council to follow the law.

The City Council enacted the challenged ordinances affording the local inhabitants of the areas prescribed protection and security from any and all disease emanating from the lack of proper sewage. To challenge these ordinances on suppositious technicalities is merely an attempt to avoid that which morally is their duty.

For the foregoing reasons the judgment of the District Court should be reversed.

Dated, Anchorage, Alaska,
December 21, 1951.

Respectfully submitted,
RALPH E. MOODY,
City Attorney, City of Anchorage,
Attorney for Appellants.